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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Amtrak asks this Court to hold that where the federal government creates an entity, mandates its purposes and structure, appoints its board, keeps it afloat through massive annual subsidies, purchases all of its property with tax dollars, and owns all of its voting stock, the entity should nonetheless be immune from constitutional constraints unless it takes action that is compelled or encouraged by a government official. In Amtrak's view of state action, a corporation created, controlled, and owned by the government need not abide by the Constitution so long as the government says it is

"not a government agency." This view would permit Congress to insulate whole areas of government responsibility from the Constitution through a mere label. Such an elevation of form over substance is contrary to the whole tenor of the state action doctrine and should be rejected.

The principal purpose of the state action doctrine is to hold government accountable where appropriate, regardless of the form in which it acts. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). A corollary purpose is to "permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). Both purposes are served by finding state action here: Amtrak is in all objective respects a government actor; and no appreciable private interest is served by affording such a government-controlled entity a right to discriminate against speech on content-based grounds.

ARGUMENT

I. AMTRAK SHOULD BE SUBJECT TO CONSTITUTIONAL CONSTRAINTS BECAUSE IT IS OWNED AND CONTROLLED BY THE UNITED STATES GOVERNMENT

In his opening brief, Lebron argued that because the United States owns and controls Amtrak, Amtrak's actions should be as subject to constitutional constraint as the Department of Transportation's actions are. Since the purpose of the state action doctrine is to apply constitutional limits where the government is responsible for certain conduct, it follows that where the government directly controls and owns an entity, it is constitutionally responsible for that entity's conduct.

Amtrak does not directly refute this principle, but instead makes four arguments for concluding that Amtrak should not be subject to the Constitution, notwithstanding the government's control and ownership. As a threshold matter, it contends that petitioner waived the argument by failing to argue below that Amtrak is a government entity. On the merits, it maintains that Amtrak should be insulated from constitutional constraints because: (1) it has a corporate structure and is to be "managed and operated as a for-profit corporation;" (2) Congress has stated that it is not a federal agency or instrumentality; and (3) this Court's prior opinions have determined that Amtrak is a nongovernmental entity. We will address these four contentions in turn.

A. Lebron Has Not Waived Any Arguments In Support Of His Claim That Amtrak Should Be Treated As A Government Actor

Amtrak contends that because Lebron did not argue in the lower courts that Amtrak is a government entity, he is foreclosed from arguing here that it should be treated as such for constitutional purposes. Resp. Br. at 13-15. That contention fails as a matter of law and fact.

As a legal matter, one waives only *claims*, not *arguments*. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992). As long as "a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[1] *Id.* Amtrak cannot and does not maintain that Lebron has waived any legal *claim*. From the beginning, Lebron's federal

[1] In *Yee*, petitioners challenged an ordinance as a taking. In the Supreme Court, they made two separate arguments in support of that claim: that it was a physical taking, and that it was a regulatory taking. The city argued that petitioners had waived the regulatory taking argument because they had not made it in the lower courts. Brief for Respondent City of Escondido at 31-33. The Court held that it did not matter whether petitioners had made the regulatory *argument* below, since they had presented a takings *claim* and therefore could advance in the Supreme Court any *arguments* they chose in support of that *claim*. *Yee*, 112 S. Ct. at 1532. (The Court went on to hold, however, that the regulatory taking argument was not encompassed in the question presented.)

claims—which allege violations of the First and Fifth Amendments—have been predicated on the assertion that Amtrak should be treated as a government actor because it is owned and controlled by the United States. Thus, because Lebron has waived none of his claims that Amtrak has violated the First and Fifth Amendments, he "can make any argument in support of th[ose] claim[s]."[2]

As a factual matter, while Lebron did not rely on the precise terminology of "government entity," he did argue below that federal ownership and control made Amtrak a government actor, the same argument he advances as Point I of his opening brief.[3] Amtrak argued in response that it was a "private, for-profit corporation," C.A. Brief of National Railroad Passenger Corp. at 11, and the Second Circuit expressly addressed the argument, holding that Amtrak is not a gov-

[2] *Id.*; *see also Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) (Court may consider any argument "so connected with [the legal claim] in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment . . . . Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed").

[3] In his appeal brief, Lebron argued that Amtrak should be treated as a government actor because the United States "created Amtrak, . . . dictated every aspect of Amtrak's corporate purpose and structure, granted it rights and privileges generally restricted to government agencies, [ ] subjected it to obligations ordinarily imposed only on government agencies . . . owns all of Amtrak's voting stock, and controls the entire membership of Amtrak's board." C.A. Brief for Michael A. Lebron 25-26.

Similarly, Lebron argued in his petition for certiorari that "[t]he court of appeals' decision treats Amtrak, *an entity that is public in every aspect but name*, as private for constitutional purposes." Pet. Br. at 10 (emphasis added); *id.* at 13 ("If the Second Circuit's decision stands, federal, state, and local governments could avoid constitutional limits on their actions merely by labeling as 'non-governmental' institutions that are in fact government-subsidized and government-controlled."); *id.* at 18 (arguing that government ownership of preferred shares and appointment of directors is "sufficient to render Amtrak a state actor").

ernment entity.[4] Finally, because all of petitioner's state action arguments rest on the same undisputed facts and because Amtrak has fully addressed all of the arguments, Amtrak is not prejudiced in any way.[5]

B. Amtrak Is Not An Independent Private Corporation, But Is Wholly Subject To Government Control

Amtrak contends throughout its brief that it cannot be a government actor as a general matter because it is a private, for-profit corporation, at one point even invoking the notion of the "corporate veil." Resp. Br. at 1-7, 16 n.15, 26-32. This argument is doubly flawed: the corporate veil is not designed to insulate governmental entities from constitutional constraints; and Amtrak is no ordinary corporation.

[4] The Second Circuit reasoned:

> Government action is most readily found when the conduct at issue is performed by a governmental entity. However, that is not the case here. The Rail Passenger Act of 1970 . . . created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporations Act. This legislation rejected earlier suggestions that the nation's passenger railroad service be nationalized. Accordingly, the Act specified that Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government.'

Pet. App. 7a (citations omitted).

[5] Amtrak's suggestion that certiorari should be dismissed as improvidently granted, Resp. Br. at 15, is frivolous. The questions presented in petitioner's brief are identical to those in the petition. The petition asked whether Amtrak's advertising policy was state action given a set of undisputed facts. Pet. Br. at i. Those facts support all three of the state action theories Lebron advances, and the petition did not limit the question presented to any particular theory. Moreover, Lebron has in no way "withdrawn" the contention that Amtrak's federally-appointed Board expressly approved the policy at issue here. *See infra* Section III; Pet. Br. at 35 ("the Board itself approved the challenged policy").

First, the corporate veil has nothing to do with the state action doctrine. It is designed to insulate shareholders from monetary liability for the debts of corporations in order to encourage capital formation and investment, to diversify investors' risks, and to subsidize corporate entities by allocating risk to creditors of insolvent corporations.[6] No precedent suggests that the corporate veil is a shield against *constitutional* responsibility. Indeed, since incorporation itself is a matter of statutory law, to allow corporate structure to subvert constitutional obligations would undermine the supremacy of the Constitution.

Second, Amtrak's efforts to portray itself as an ordinary "private, for-profit corporation" only underscore the extent to which it is not.[7] The only reason Amtrak is operated "as a for-profit corporation" providing rail passenger service is because Congress has mandated that it do so. Private corporations independently *choose* whether to operate on a for-profit or a

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[6] *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990); *Anderson v. Abbott*, 321 U.S. 349, 361-62 (1944); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039-40 (1991).

[7] Both Amtrak and the United States have argued that Amtrak should be treated not as an ordinary private entity, but as a government entity, when it suits their purposes. Pet. Br. at 30 n.43; *see also National R.R. Passenger Corp. v. Commonwealth of Pennsylvania P.U.C.*, 848 F.2d 436, 440 (3d Cir.) (accepting Amtrak's argument that its exemption from state taxes should be broadly construed because Amtrak is not a private corporation, but a federal entity that should be exempt " '*to the same extent as the United States is exempt*,' " quoting H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981) (court's emphasis)), *cert. denied*, 488 U.S. 893 (1988); United States' Response to Defendant's Motion to Dismiss or Transfer 16-22 in *United States v. Kaplan Trucking Co.*, No. 94-962-C (S.D. Ind., filed Sept. 16, 1994) (arguing that Amtrak falls within the False Claims Act "[b]ecause Amtrak is a quasi-public Government corporation, and because of the Federal government's 'deep and controlling entwinement' in Amtrak's structure and operations"). (A copy of this brief, which details the United States' extensive control over and investment in Amtrak, has been lodged with the Court.)

not-for-profit basis, what kind of business to conduct, and whether to change the nature of their business. Amtrak, by contrast, must do what Congress has instructed it to do in the form and manner that Congress has (in detail) prescribed.[8]

While Congress initially gave Amtrak some of the trappings of a private corporation—it was established as a "for-profit" corporation and originally had only private shareholders—Congress always retained the power to override Amtrak's corporate structure. 45 U.S.C. § 541 (Amtrak incorporated under D.C. Business Corporation Act, but only "to the extent consistent with" the federal Amtrak statute).[9] Congress has repeatedly exercised that power.

Most significantly for purposes of this case, in 1981 Congress, acknowledging the reality that Amtrak had never made a profit and was dependent on massive federal support, unilaterally transformed Amtrak into a corporation owned and

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[8] Amtrak also argues that because it performs a "commercial" function, and is supposed to operate on a for-profit basis, it is not a governmental entity. Resp. Br. at 16-17, 25-26. But neither the performance of a commercial function nor the attempt to make a profit are incompatible with being a government entity. The United States Enrichment Corporation, for example, is a wholly-owned government corporation designated as "an agency and instrumentality of the United States," 42 U.S.C. § 2297b(c), yet it was created specifically "[t]o operate as a business enterprise on a profitable and efficient basis." *Id.* at §§ 2297a(1), 2297c-1. Similarly, the Tennessee Valley Authority has commercial functions and is designed in large part to be self-supporting, yet is indisputably subject to the Constitution. 16 U.S.C. § 831n-4(f). Other government corporations, such as the Federal Crop Insurance Corporation, perform the traditionally commercial functions of providing insurance and credit, just as private insurance companies and banks have long done. Pet Br. at 24 n.30.

[9] In Pub. L. No. 103-272 § 24301 *et seq.*, 108 Stat. 745, 903 (1994), Congress revised and recodified "without substantive change" in Title 49 (Transportation) certain laws related to transportation, including the provisions in Title 45 relating to Amtrak. H.R. Rep. No. 180, 103d Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818. For clarity, however, this brief continues to cite the provisions of Title 45.

controlled by government, and eliminated all private representation from the Board.[10] As a result, Amtrak today bears no resemblance to a private corporation:

- its Board is wholly appointed by the United States;
- the United States owns all of its preferred shares, and as of October 1992 had 791,982,000 votes to the common shareholders' 9,385,694 votes;[11]
- Congress dictates the qualifications—including the nationality—of its Board members, and sets the compensation for its directors and officers, 45 U.S.C. §§ 543(a)(1) and (5), 543(d);
- Congress has exempted it from all state and local taxes, 45 U.S.C. § 546b, because "State and local taxes on a primarily Federal investment are inappropriate;"[12]
- like a government agency, it is subject to the Freedom of Information Act, the Government in the Sunshine Act, the Americans with Disabilities Act, the Inspector General Act of 1978, and the Davis-Bacon Act;[13]

[10] In doing so, Congress overrode the D.C. Code and Amtrak's articles of incorporation and bylaws to: (1) eliminate all directors elected by the common shareholders from Amtrak's Board; and (2) mandate issuance to the United States of preferred shares in an amount equalling Congress's appropriations to Amtrak. Pet. Br. at 6-7; D.C. Code Ann. §§ 29-354, 29-355 (1981). As a practical matter, these measures eliminated the voting rights of the private shareholders and gave controlling power to the United States. The common shareholders were given no say in this process.

[11] J.A. 390-91. The common shares are nonvoting in the sense that they do not elect directors. While it is theoretically true, as Amtrak contends, that the common shareholders are entitled to vote on such major issues as merger, consolidation, and dissolution of the corporation, D.C. Code Ann. §§ 29-366 (1981), 29-378 (1981 & Supp. 1994), their votes would be meaningless. As the sole owner of the preferred shares, the Secretary of Transportation's vote would always be determinative.

[12] S. Rep. No. 253, 97th Cong., 1st Sess. 103 (1981).

[13] *See* Pet. Br. at 8-9; 45 U.S.C. § 565(d). The Davis-Bacon Act, 40 U.S.C. § 276a, sets wage levels for certain types of construction contracts to which the United States or the District of Columbia is party. The Act treats Amtrak not as a contractor, but as the United States.

- it is audited by the General Accounting Office, and must report to Congress annually on its fiscal condition, on-time performance, passenger services, and related matters, Pet. Br. at 9 & n.17;
- Congress does not require it to be profitable, but only to recover 61% of its costs (excluding capital costs) from revenues, 45 U.S.C. § 564(c)(4)(A);
- and, unlike any other private for-profit corporation we know of, it has existed for 24 years without once making a profit, depending instead for its survival on billions of dollars of federal support, 45 U.S.C. §§ 601, 854.[14]

Although Amtrak denies that it is covered by the Government in the Sunshine Act, Congress made clear that it intended the Act to cover Amtrak. H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 10-11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2244, 2246 ("the intent and understanding of the conferees is that meetings of . . . [Amtrak] are included within the definition of agency"). And Amtrak acts as if it is covered. J.A. 652 (Appendix A to Amtrak's Bylaws "implements the spirit and intent of the Government in the Sunshine Act").

[14] In an attempt to camouflage its overwhelming federal subsidies, Amtrak points to the initial $197 million contribution from private railroad companies. Resp. Br. at 3. Amtrak provides no authority for this figure, and it more than doubles the stated paid-in capital represented by the common shares in every Amtrak annual report. *See, e.g.*, J.A. 387 (1992), 418 (1976). But even if Amtrak's figure is correct, it amounts to only 1.3 percent of the approximately $15 billion that Congress has appropriated for Amtrak. 45 U.S.C. §§ 601(a) and (b); 854(a)(1) and (a)(2) (1988 & Supp. II 1990, Supp. IV 1992).

Amtrak is similarly disingenuous in suggesting that it independently paid $87 million for the Northeast Corridor properties transferred to it by congressional mandate. Resp. Br. at 4. In fact, Amtrak agreed to pay that amount over an eight-year period from 1976-84, during which time Amtrak made not one cent in profits and received $5.5 billion in federal appropriations. G. Hilton, *Amtrak: The National Railroad Passenger Corporation* 27 (1980); 45 U.S.C. §§ 601(a) and (b) (1988).

(*footnote continued*)

Thus, Amtrak is for all intents and purposes a government corporation controlled and owned by the United States.[15] The only thing even nominally private about Amtrak is its four private shareholders, but Congress has ensured that their shares are chimerical: they provide no representation on the Board, no effective voting control, and are worthless. Pet Br. at 8.[16]

Amtrak also attempts to minimize its financial dependence on the United States by claiming that in 1992 the federal subsidy was "only" 18 percent of its total operating expenses and that that percentage has been declining. Resp. Br. at 5, 20 n.21. As recent GAO testimony demonstrates, however, this figure is misleading: it does not consider capital expenses at all, and excludes expenses such as depreciation, taxes, user fees, retirement payments, and certain losses. *Department of Transportation and Related Agencies Appropriations for 1995, Hearings Before the Transportation Subcomm. of the House Appropriations Comm.*, 103d Cong., 2d Sess. 587, 599 (Mar. 17, 1994) (Testimony of Kenneth Mead). For 1993 alone, the GAO calculated that Amtrak omitted $370 million in actual operating expenses from its revenue-to-expense ratio. *Id.* at 587. Furthermore, since 1987, Amtrak has spent down its working capital by $252 million, and as a result, its "current financial condition has deteriorated in recent years." *Id.* at 593. Amtrak has in fact received steadily *increasing* annual appropriations from Congress, exceeding $900 million in 1994, *id.* at 596, and "its total needs for federal subsidies (operating and capital) have steadily increased," *id.* at 593. Amtrak requested almost $1.3 billion in federal support for fiscal year 1995. In short, this is not a corporation moving toward financial independence.

[15] These factors obviously distinguish Amtrak from "American Airlines, Chrysler, and the American farmer," Resp. Br. at 27, because none of those entities is owned and controlled by the United States.

[16] Even if Amtrak retains some vestigial corporate form, courts have long recognized that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 & n.10 (D.C. Cir. 1974) ("Where the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through [them]"); *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis Civic and Commerce Ass'n*, 247 U.S. 490, 500-01 (1918); *Francis O. Day Co. v. Shapiro*, 267 F.2d 669, 672-74 (D.C. Cir. 1959). If public statutory policy warrants ignoring the corporate form, the Constitution surely does too.

C. Congress's Label Does Not Govern The State Action Inquiry

Notwithstanding the above facts, Amtrak contends that the Court should find that Amtrak is not a governmental actor for constitutional purposes because Congress designated Amtrak "not an agency . . . of the United States Government." Resp. Br. at 16-18, 22-23. Yet it admits, as it must, that Congress's label cannot "ultimately determine whether the Constitution applies to a particular action Amtrak takes." *Id.* at 23 n.23. As one district court more directly stated, "[i]f federal government involvement with Amtrak resulted in constitutional deprivations, a congressional attempt to disavow the involvement could hardly insulate it from the Constitution." *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 727 n.3 (N.D. Ill. 1984).

The question here is not whether Congress's label is "a mistake or sham." Resp. Br. at 23. Indeed, there is no evidence that Congress's label was even intended to address the state action inquiry. For that matter, Congress has not been consistent with its labels, and has frequently treated Amtrak as a government entity (*see* Pet. Br. at 8-9), subjecting it to obligations only government entities bear.[17]

Labels aside, the question for the Court is simply whether the objective relationship between the government and Amtrak is such that Amtrak's conduct should be subject to the Constitution.

[17] Amtrak has no effective response to this fact, so it buries it in a footnote. Resp. Br. at 17 n.17. Buried with it is Amtrak's flat assertion that "it does not help petitioner that Amtrak is included in a list of 'mixed-ownership Government corporations,' " without an explanation why, if it does not help petitioner when Congress treats Amtrak as a government entity, it should help Amtrak when Congress says that Amtrak is not an agency of the United States.

D. This Court Has Not Addressed Whether Amtrak, In Its Current Form, Is A Government Entity

Amtrak argues that this Court has already held that Amtrak is not a government entity in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985), and has also held that the "similarly structured" (in Amtrak's words) Conrail is not a federal instrumentality in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974). Resp. Br. at 18-20, 29-30. Neither case is controlling here.

As Lebron previously pointed out, Pet. Br. at 28 n.39, while the Court in *Atchison, Topeka* stated that Amtrak was a nongovernmental entity, that statement was unnecessary to the result. Whether the contracts at issue were with a government entity or a private entity would not have changed the result, because the Court squarely held that the contracts did not create the right assertedly impaired.[18] 470 U.S. at 474-75.

More important, Amtrak today is a very different entity from the 1971 Amtrak that signed the Basic Agreements at issue in *Atchison, Topeka*.[19] At that time, Amtrak was wholly

[18] Amtrak suggests that because the Court might have applied a more rigorous standard of review to a claim that Congress had impaired its own contractual obligations, the Court's treatment of Amtrak as a nongovernmental entity might have made a difference to the result. Resp. Br. at 19 n.19. But the more rigorous review to which Amtrak refers implies only that Congress has less scope to *impair* its own obligations than to impair private contractual arrangements. *Perry v. United States*, 294 U.S. 330, 350-51 (1935). It does *not* affect the prior issue of whether the contract creates the right asserted, the issue the railroads lost in *Atchison, Topeka*. Nothing in that case—or indeed any other—suggests that the same contractual language would give rise to a contract right when signed by a governmental entity but not when signed by a nongovernmental entity.

[19] Amtrak suggests that "Amtrak's structure and operations at the time [*Atchison, Topeka* was] decided were essentially the same as they are today," Resp. Br. at 20 n.21, but the relevant time period was obviously not 1985, when the case was decided, but 1971, when the Basic Agreements were signed. The issue was whether Amtrak was a governmental or nongovernmental entity when the Basic Agreements were signed and the original legislation went into effect, *i.e.*, in 1971. Amtrak's structure as of 1985 was therefore not relevant to the issues decided.

owned by private shareholders. Today, by contrast, the United States has effectively taken it over, and for all practical purposes is its sole owner. Thus, even if it were accurate to say that Amtrak was a nongovernmental entity as of 1971, it is inaccurate today.

For the same reasons, Amtrak's reliance on the Court's treatment of Conrail in 1974 is misplaced. In the *Regional Rail Reorganization Act Cases*, the Court found that Conrail was not a "federal instrumentality" for eminent domain purposes. 419 U.S. at 152. But Conrail did not even exist at that time; it did not come into being until two years later, in 1976.[20] Thus, the Court could examine only Congress's intention for Conrail as reflected in the reorganization statute, and the stated intention was that Conrail, while initially supported by some government funds, would become a private corporation. 419 U.S. at 152. The Court reasoned that while Conrail would have federally-appointed directors on its Board, those directors' responsibilities "are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders." *Id.* Thus, in 1974 the Court treated the future Conrail as a private entity because that was Congress's plan; in fact, Conrail was eventually privatized. While Congress initially had similar hopes for Amtrak, those hopes were soon dashed, and Congress made Amtrak a government corporation.

II. THE SYMBIOTIC RELATIONSHIP TEST IS NOT LIMITED TO EQUAL PROTECTION CLAIMS

Lebron's opening brief demonstrated that Amtrak's relationships with the federal government and several state enti-

[20] Lloyd Musolf, *Uncle Sam's Private, Profitseeking Corporations: Comsat, Fannie Mae, Amtrak, and Conrail* 76 (1983).

ties at Penn Station easily satisfy the "symbiotic relationship" test for state action first articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Pet. Br. at 32-37. Amtrak does not dispute that such a symbiotic relationship exists here, and it makes no attempt to distinguish its governmental relationship from that of the Eagle Coffee Shoppe and the State of Delaware in *Burton*.

Instead, Amtrak argues that the *Burton* test should be limited to equal protection claims. Resp. Br. at 41-49. Under this extraordinary view, the same action by the same entity with the same ties to government will be state action for purposes of some constitutional challenges but not others. Thus, had the Eagle Coffee Shoppe refused to serve customers who would not declare their support for the Ku Klux Klan, its conduct would be state action for a race discrimination challenge, but private conduct for a First Amendment challenge.

This argument is simply another version of the Second Circuit's differential state action analysis, yet Amtrak offers no response to the anomalies that such an approach creates. Pet. Br. at 42-45.[21] Amtrak contends that this double standard is compelled by the Equal Protection Clause, which, it maintains, is unique in that it may be violated by government inaction. As shown below, Amtrak's theory is premised on a false distinction, cannot be squared with this Court's own treatment of *Burton*, and misunderstands both the equal protection and state action doctrines.

Amtrak's argument collapses at the outset because it is based on a false distinction. As this Court has long recognized, discriminatory conduct that violates the First Amendment also violates the Equal Protection Clause. *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Amtrak's refusal

[21] For example, Amtrak does not explain why under its theory discrimination based on race, gender, or religion triggers a *Burton* analysis, Resp. Br. at 49-50, but discrimination based on speech does not.

to display Lebron's advertisement is a failure to treat Lebron equally because of the political content of his speech, and as such Lebron has claimed that it violates *both* his free speech and equal protection rights.[22] Since First Amendment claims can virtually always be cast as equal protection claims, Amtrak's proffered distinction is illusory.

Amtrak's view of *Burton* is also contrary to this Court's application of *Burton* over more than thirty years. As Lebron pointed out in his opening brief, both this Court and lower courts have routinely applied *Burton*'s "symbiotic relationship" analysis to claims other than race discrimination, including First Amendment and due process claims. Pet. Br. at 42 & nn.57, 58.

Amtrak's rationale for limiting *Burton* to equal protection claims rests on a misunderstanding of both the equal protection *and* state action doctrines. Contrary to Amtrak's brief, the Equal Protection Clause is generally *not* violated by government inaction. In fact, only government action that is intentionally designed to harm an identifiable group violates the Fourteenth Amendment.[23]

While the *Burton* Court did state that in certain circumstances, government "inaction" in the face of discrimination may violate the Constitution, 365 U.S. at 725, that is a func-

[22] Lebron pleaded both equal protection and First Amendment claims in his complaint. C.A. App. A91 (First Amendment claim); *id.* at A92 (equal protection claim), and briefed both claims in the district court. *See* Plaintiff's Conclusions of Law at 28-30, Plaintiff's Mem. in Supp. of Motion for TRO and Preliminary Injunction at 28-30. The district court reached only the First Amendment claim.

[23] *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (equal protection violation requires showing that government official "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group") (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)); *Washington v. Davis*, 426 U.S. 229 (1976) (police department's failure to change test that disproportionately disqualified black applicants does not violate equal protection).

tion of the state action doctrine, not the Fourteenth Amendment. No matter what constitutional provision is at issue, government inaction may violate the Constitution where the government has such a symbiotic relationship with another entity that it is "a joint participant in the challenged activity." *Id.* But in that circumstance, the government is not being held liable for *inaction*; rather, the government *and* the other entity are held jointly responsible for the entity's *action*.

Thus, Amtrak is wrong when it suggests—without any authority—that the Eagle Coffee Shoppe would not have been engaged in state action had it discriminated on the basis of speech rather than race. If, to take Amtrak's hypothetical, the Eagle Coffee Shoppe had refused to display a political ad for the same reason that it refused to serve black patrons—on the ground that it might drive away other customers and thereby reduce revenues—all the factors that supported the symbiotic relationship would have been the same, and state action would have been properly found.

Amtrak argues that First Amendment claims should be treated differently because while a private entity has no right to discriminate, it does have First Amendment rights. But the notion that Amtrak—controlled and owned by the federal government—should have a First Amendment right to engage in content discrimination gets the Constitution precisely backwards. When an entity is a "joint participant" with the government such that its actions are state action, it is no longer private for those purposes, and thus it has no more First Amendment rights than the government with which it is a joint participant.

Amtrak's claim that it should be protected by the First Amendment leads precisely to the dangers that Judge Pierre N. Leval initially identified. Pet. App. at 12b. Under Amtrak's view, not only can it not be sued under the First Amendment for engaging in content discrimination, it can use the First Amendment as a shield against the federal government's

attempts to control its speech access policies, no matter how discriminatory its policies may be. *See* Pet. Br. at 28-30.

III. THE UNITED STATES' CONTROL OF AMTRAK SATISFIES THE CLOSE NEXUS TEST, BECAUSE THE FEDERALLY-APPOINTED BOARD IS DIRECTLY RESPONSIBLE FOR THE POLICY CHALLENGED HERE

Amtrak argues that the "close nexus" test is the *only* state action test that the Court should apply here, and that Lebron has failed to satisfy that test. Both claims are wrong.

First, Amtrak's contention that the "close nexus" test is *the* appropriate test here, Resp. Br. at 36, would require rejection of much of this Court's state action jurisprudence, and would leave the Court without adequate tools to determine when "the nonobvious involvement of the State in private conduct" supports the application of constitutional constraints. *Burton*, 365 U.S. at 722. The "close nexus" test is just one of several tests the Court has formulated for determining when to apply constitutional constraints to an entity that is not indisputably governmental, but it is certainly not the only one. If state action could not be established without showing that government encouraged or compelled the conduct in question, this Court's most recent state action decisions would have been wrongly decided. In neither *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), nor *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), was there any evidence that the state compelled or encouraged the attorneys to engage in race-based peremptory challenges.[24]

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[24] Indeed, in all of the cases Amtrak cites to support its "close nexus" argument, the Court also applied the "symbiotic relationship" test that Amtrak now argues should be restricted to equal protection claims. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

Second, the Board's direct responsibility for Amtrak's advertising policy satisfies the "close nexus" test. Amtrak contends that the Board "is not the United States," because the directors are not federal officials, and their responsibilities "are no different from those of the directors of any other corporation—'to operate [Amtrak] at a profit for the benefit of the shareholders.' " Resp. Br. at 37.

But whether someone appointed by and acting on behalf of the United States is labeled an "official" can hardly decide the state action question—such an approach would be subject to the same tautological problems as would relying on Congress's statement that Amtrak is not a government agency. And while the directors are responsible to the "shareholders," the shareholders are, for all practical purposes, the United States government. Thus, these directors are not like any other corporate directors—they are appointed by and responsible to the government. Together, they constitute the policy-making body for an entity owned and controlled by government. As such, their actions are government action.

Amtrak also maintains that even if the Board's actions can be attributed to the federal government, the Board had no responsibility for the policy challenged here. This is a remarkable argument, given that Amtrak itself refers to the ban on political advertising as its "long-standing policy." Resp. Br. at 2, 49. Amtrak objects that there is no evidence in the record showing that the directors actually sat down and read the specific pages of the contracts that authorize the policy. *Id.* at 38-40. But of course, that will often be the case with boards of directors, and indeed, high (and not-so-high) government officials. Nonetheless, it is black-letter law that a board is responsible for corporate policy and cannot evade that responsibility by claiming ignorance.[25]

[25] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 3.03 (May 13, 1992) (knowledge of corporate documents is imputed to directors); *Estate of Grant v. U.S. News & World Report, Inc.*, 639 F. Supp. 342, 349 (D.D.C. 1986) (directors cannot plead ignorance of corporate documents unless they were "actively concealed").

Moreover, the evidence unequivocally supports the conclusion that Amtrak's Board expressly approved this policy. According to Amtrak, the only written authority for the policy is contained in a series of contracts between TDI and Amtrak, dating between 1980 and 1991, each of which—again according to Amtrak—could not have been signed without Board approval. J.A. 28; Pet. Br. at 35 n.50. And the record shows that the Board expressly authorized the most recent contract, re-endorsing the language that Amtrak may reject any advertising it finds "objectionable." J.A. 401-02, 204.

In the face of this evidence, Amtrak argues that because the Board authorized the 1991 contract *before* it was signed, the Board members did not necessarily read the contract, and should not be deemed responsible for its terms. Resp. Br. at 38-39. But as a practical matter, boards often authorize contracts before they are signed, particularly where, as here, the contract cannot be signed without board approval. Amtrak's argument would make nobody responsible for the contract: the officer who physically signed it could point to the Board, which formally authorized him to do it, and the Board could point back at the officer, because he signed it after the Board approved it. Amtrak's argument is particularly disingenuous in light of its representation that the policy against political advertising, reauthorized by the 1991 contract language, has been in existence since Amtrak's inception.

Therefore, even under the "close nexus" test, state action is established here because the "long-standing" policy challenged was approved by and is the direct responsibility of Amtrak's Board of federal appointees.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the decision of the court of appeals should be reversed, and the case remanded for determination of Lebron's First and Fifth Amendment claims.

Respectfully submitted,

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